

1
2
3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 JAMES V. KELLY; CRESCENT BAR
7 CONDOMINIUM MASTER ASSOC., et al.,

NO. CV-11-023-JLQ

8 Plaintiffs,

9 vs.

**ORDER GRANTING PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

10 PUBLIC UTILITY DISTRICT NO. 2., et al.,

11 Defendants.
12

13 BEFORE THE COURT is Plaintiffs' Motion for Temporary Restraining Order and
14 Preliminary Injunction (ECF No. 211). The Motion is unopposed, except as to two
15 issues: 1) the duration of the injunction and 2) the proposed amount of the bond. The
16 parties have had an extended time to submit briefs. Having considered the matter, the
17 court **GRANTS** Plaintiffs' Motion.

18 **I. BACKGROUND**

19 Plaintiffs allege the following:

20 In 1955, FERC issued a 50-year license to the Public Utility District No. 2 of Grant
21 County to operate the Priest Rapids Hydroelectric Project on the Columbia River.
22 Crescent Bar Island ("the Island") is an island located in the Columbia River within the
23 project boundaries.

24 *1962 PUD-Port Lease.* In 1962, the PUD entered into a lease of the Island to the
25 Port of Quincy for "public and recreational purposes" which lease was scheduled to
26 terminate in fifty-years in 2012 ("PUD-Port lease"). The 1962 PUD-Port lease included
27 a provision incorporating by reference the terms and conditions of the 1955 FERC
28 license.

1 *1970 Port-Crescent Lease.* In 1970, the Port subleased a portion of the island to
2 the predecessor of Crescent Bar, Inc. ("Crescent"), which sold leasehold interests to
3 members of the public for the development of recreational homes and condominiums on
4 the island. The Complaint alleges that in 1973 the Port-Crescent lease was modified to
5 expressly extend the term of Crescent's leasehold from 2012 to February 28, 2023
6 because of the financing requirements of the contemplated improvements to the Island.

7 Thereafter, the PUD and Port are claimed to have entered into an amendment
8 extending the term of the 1962 PUD-Port lease to 2023, subject to FERC approval. That
9 agreement stated the parties would "promptly...submit" their proposed extended sublease
10 for approval of FERC. ECF No. 46, Ex. B. The Complaint further alleges that in 1975,
11 the Port, with approval of the PUD, entered into an agreement which identified a dispute
12 between the parties regarding the term of the Crescent lease.

13 *1979 Lease.* In 1979, the PUD, the Port and Crescent are alleged to have entered
14 into a new lease (replacing all prior agreements), which included a term providing that
15 the PUD, Port, and Crescent "reaffirm their desire to extend the term of the June 5, 1962
16 and this Lease Agreement until February 28, 2023," subject to FERC approval. ECF No.
17 40, Ex. B at 31. The 1979 lease also stated that "**Application to the [FERC] for**
18 **approval....shall be required...**" Id. at 34. The Port also agreed that upon request, it
19 would exercise "reasonable diligence" to get an extension of its lease with the PUD in
20 order to give Crescent a fifty(50)-year extension of its lease term. ECF No. 40, Ex. B, at
21 48-49.

22 Plaintiffs allege that over the next two decades, the PUD expressed its commitment
23 to the lease extension and its agreement to seek FERC approval of the extension. Though
24 FERC has apparently not to date formally approved any lease extension terms, CBI
25 private residential units were constructed and interests sold. Plaintiffs are condominium
26 leasehold owners and condo associations who have made substantial investments in CBI.

1 In 1999, FERC determined in an Order that "after 1965, all leases of projects lands
2 needed Commission approval" and that subsequent subleases purporting to extend the
3 term to 2023 "have not received commission approval." ECF No. 40, Ex. E. In a
4 footnote of that decision, the Commission noted that the PUD "has long been aware of
5 the need for Commission approval of its lease agreements..." In 1973, the Commission
6 apparently declined to approve the lease terms beyond the term of the existing license.
7 Though the Commission changed its policy in 1980 to allow approval of leases extending
8 beyond the license term, the PUD did not subsequently seek Commission approval of the
9 lease extension.

10 *2008 FERC License.* In 2005, the PUD's FERC license was to expire. In 2003, the
11 PUD applied for a new license. In 2008, FERC granted the PUD a new forty-four (44)-
12 year license. The 2008 License requires the PUD to develop and submit a final Shoreline
13 Management Plan ("SMP"). In April 2010, the PUD submitted to FERC a SMP which
14 would eliminate residential use of CBI after 2012. Plaintiffs have intervened in the
15 FERC proceeding to challenge the PUD proposed SMP. The FERC proceeding regarding
16 the SMP is ongoing.

17 The PUD and the Port have ordered Plaintiffs to vacate the premises on or before
18 June 1, 2012.

19 Based on the foregoing, Plaintiffs filed this lawsuit claiming that by contract and/or
20 promissory estoppel, they have the right to maintain and occupy their residences at least
21 until 2023. Plaintiffs claim the PUD and the Port have breached their agreement to
22 obtain FERC approval to ensure the 1979 lease was extended to 2023 and that promissory
23 estoppel bars them from terminating the 1979 lease and evicting Plaintiffs prior to 2023.
24 Plaintiffs also claim the PUD and the Port have violated the Fifth and Fourteenth
25 Amendments of the U.S. Constitution. Plaintiffs seek injunctive relief to prohibit the
26 Defendants from evicting them.

27 On December 27, 2011, the court entered a Temporary Restraining Order enjoining
28 the Defendants from proceeding "with the eviction of Plaintiffs and/or their members"

1 pending a preliminary injunction hearing. On January 23, 2012, Plaintiffs timely filed
2 their Motion for Temporary Restraining Order and Preliminary Injunction. ECF No. 211.

3 **II. DISCUSSION**

4 The court has already entered a Temporary Restraining Order (TRO) in this matter
5 pursuant to Fed.R.Civ.P. 65(b). ECF No. 188. The purpose of a TRO is "preserving the
6 status quo and preventing irreparable harm just so long as is necessary to hold a hearing
7 [on the preliminary injunction application], and no longer." *Granny Goose Foods, Inc. v.*
8 *Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423 (1974); *see also Reno Air*
9 *Racing Ass'n v. McCord*, 452 F.3d 1126, 1130–31 (9th Cir.2006). The standard for
10 issuing a Preliminary Injunction is essentially the same as that for issuing a Temporary
11 Restraining Order. *See Stuhlberg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832,
12 839 n. 7 (9th Cir. 2001).

13 A plaintiff seeking a Preliminary Injunction must establish (1) likely success on the
14 merits; (2) likely irreparable harm in the absence of preliminary relief; (3) that the
15 balance of equities tips in the plaintiff's favor; and (4) that an injunction is in the public
16 interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Under the
17 "sliding scale" approach to preliminary injunctions observed in the Ninth Circuit, "the
18 elements of the preliminary injunction test are balanced, so that a stronger showing of one
19 element may offset a weaker showing of another." *Alliance for the Wild Rockies v.*
20 *Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (*citing Clear Channel Outdoor, Inc. v. City*
21 *of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)). "[A]t an irreducible minimum,"
22 though, "the moving party must demonstrate a fair chance of success on the merits, or
23 questions serious enough to require litigation." *Guzman v. Shewry*, 552 F.3d 941, 948
24 (9th Cir. 2009).

25 Defendants do not concede the merits of Plaintiffs' Motion, though they are not
26 opposed to the entry of the Preliminary Injunction because they believe this dispute will
27 be resolved by arbitration.

1 **A. Likelihood of Success of the Merits**

2 Plaintiffs have analyzed each of their claims' likelihood of success. Plaintiffs
3 contend they are likely to prevail on their contention that the PUD and Port breached
4 their agreements to extend their leases to a 2023 term and breached their duties of good
5 faith to take actions necessary to obtain FERC approval of the extension. Plaintiffs
6 contend the PUD chose not to seek FERC approval of the extension, despite their
7 contractual obligation to do so, on which Plaintiffs relied. Plaintiffs also claim they are
8 likely to succeed on their breach of contract and promissory estoppel claims against the
9 Defendants. Plaintiffs' claim the PUD, by promising to approve and obtain lease
10 extensions to 2023 created a contract and breached that contract when they rejected that
11 position. Plaintiffs claim further breaches of its promises by the PUD when it notified the
12 Port, CBI, and Plaintiffs that their leases would expire and they would be evicted.
13 Likewise, Plaintiffs assert the Port breached its agreement by deciding to evict Plaintiffs
14 instead of honoring its agreement to extend their leases and by failing to pursue the
15 promised lease extensions with FERC. Finally, Plaintiffs contend they are likely to
16 succeed on their claim that the Port and PUD have violated their substantive and
17 procedural due process rights under the Fifth and Fourteenth Amendments by interfering
18 with Plaintiff's property rights in an irrational and arbitrary manner.

19 The Port responded briefly to Plaintiffs' showings stating that Plaintiffs' claims
20 "face multiple barriers including at least the plain language of the lease documents, the
21 parties multiple efforts, over decades, to extend the lease, the collateral estoppel effects of
22 prior FERC decisions, and the statute of limitations." ECF No. 224 at 2. Although the
23 court can only surmise the precise nature of these defenses, none are so plainly
24 meritorious so as to undermine the fact that there are questions serious enough to require
25 trial, if necessary. The court notes the doctrine of collateral estoppel does not preclude
26 litigation of a question not within FERC jurisdiction, and could only apply potentially to
27 issues which are in substance the same. It is alleged that the PUD has never sought
28 FERC approval of the Plaintiffs' continued residential use of Crescent Bar Island through

2023 as allegedly promised and the court is not aware of a FERC decision on this precise issue. As for the statute of limitations, this is a commonly asserted defense in cases involving decades of relevant conduct. However, Plaintiffs assert their claims accrued in 2010 when Defendants rejected the 2023 lease term and took actions contrary to the 1979 lease and its promises to seek FERC approval.

Based on the unopposed Motion and appraising the Plaintiffs' claims as presented to the court, the court finds the Plaintiffs have shown a likelihood of success on the merits and have established there are questions "serious enough to require litigation."

B. Likelihood of Irreparable Harm

Plaintiffs' contend the denial of their motion would cause immediate, irreparable injury. The PUD and Port have ordered the eviction of Plaintiffs on or before June 1, 2012. Plaintiffs would lose their property, homes, and businesses. The Plaintiff associations claim an eviction would destroy "their essential purpose and ultimately cause their dissolution." The loss of real property, because it is unique, is an irreparable injury. *Sundance Land Corp. V. Community First Federal sav. And Loan Ass'n.*, 840 F.2d 653 (9th Cir. 1988).

C. Balance of Equities and Public Interest

The court finds that the balance of equities and public interest elements both demonstrate that the issuance of a Preliminary Injunction is appropriate. As Plaintiffs point out, the public interest is served by keeping people in their homes and keeping businesses in operation. For forty years, the Defendants observed and apparently encouraged the development of the Island. Not until 2010, did the PUD shift its position of the continued residential occupation of the Island. Given the great potential impact of eviction and the promises made by Defendants regarding an extension to 2023, the proposed injunction should have been a clearly predicted consequence of the current positions of the Defendants. Any potential impact on the Defendants would be nominal in comparison to the potential impact of an eviction of the Plaintiffs from their homes and businesses, especially where the PUD's stated intent was allegedly to alter the current

1 uses of the Island. Furthermore, given the unopposed nature of this Motion to preserve
2 the status quo, the court finds the balance of hardships and the public interest is in favor
3 of the Plaintiffs.

4 **D. Bond Amount**

5 Rule 65(c) of the Federal Rules of Civil Procedure provides that a district court
6 may grant a Preliminary Injunction "only if the movant gives security in an amount that
7 the court considers proper to pay the costs and damages sustained by any party found to
8 have been wrongfully enjoined or restrained." The court retains continuing discretion as
9 to the amount of bond, if any, but should consider the realistic likelihood of harm to an
10 enjoined party when considering the amount of the bond. *Diaz v. Brewer*, 656 F.3d 1008,
11 1015 (9th Cir. 2011). The "bond amount may be zero if there is no evidence the party will
12 suffer damages from the injunction." *Connecticut General Life Ins. Co. v. New Images of*
13 *Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003). The burden of establishing the amount
14 of bond necessary to secure against the wrongful issuance of an injunction rests with the
15 Defendant. *See e.g., Doctor's Assocs. v. Stuart*, 85 F.3d 975, 985 (2d Cir.1996)
16 (suggesting burden on defendant to support claim for bond).

17 The PUD stipulates to the issuance of the injunction without imposition of a bond.
18 ECF No. 223 at 3. Plaintiffs argue that no bond is necessary as they (and CBI) will
19 continue to pay rent to the Port according to a formula provided for by contract.
20 Plaintiffs suggest that if they are required to post a bond, the court should impose no
21 more than \$13,632.27, the amount of quarterly rent paid by CBI to the Port. ECF No.
22 230.

23 The Port asks the court to impose a bond in the amount of \$826,500 per month, or
24 alternatively, impose as a condition in the injunction that the Port would be absolved of
25 any liability for "holdover rents" in the event Plaintiffs' tenancies are determined to expire
26 in 2012. Such a bond would obviously be confiscatory in nature compared to the rent
27 currently paid under the lease. The Port did not cite any authority or produce any
28 evidence with its Response to support the its contention that it might suffer damages

1 caused by the injunction. However, on March 13, 2012, without obtaining leave of court,
2 counsel for the Port filed a supplemental declaration attaching a letter from the PUD
3 received after the Response was filed. The letter, dated February 28, 2012, from the PUD
4 to the Port Commissioners states that "it is the PUD's position that the 1962 Lease expires
5 on June 1, 2012" and

6 [t]herefore, commencing on June 2, 2012, PUD will be entitled to one of the
7 following from PORT until PUD has possession and control of the property leased
8 by PUD to PORT under the 1962 lease:

9 (1) Holdover damages under Washington law equal to (a) the reasonable rental
10 value of the demised property in amounts averaging \$2800 per month for each
11 condominium and \$1700 per month for each RV space, or the reasonable rental
12 value of the demised property as determined by appraisal, if higher than that set
13 forth in this subparagraph; and (b) reimbursement to PUD for all costs for required
14 infrastructure, including upgrading of sewer, fire prevention systems, water
15 systems, and electrical systems, paid by PUD after June 2, 2012, until PUD has
16 possession and control of the demised property; or

17 (2) Should the 1962 lease be determined to extend beyond June 1, 2012, PUD will
18 be entitled to reasonable rental values and reimbursement for infrastructure costs
19 paid as set forth in Section (1) above.

20 ECF No. 245 at 9-10.

21 While there is nothing wrong with advising a party of the PUD's legal position,
22 ignoring that there is ongoing litigation and conducting itself as if the merits of this case
23 have already been decided in its favor is inappropriate. This type of conduct also tends to
24 create aggravation rather than move the dispute toward an appropriate resolution.

25 In determining the amount of a security bond, the court must consider the potential
26 damages arising *from the operation of the injunction itself, not from damages occasioned*
27 *independently of the injunction*. Here, the costs and damages that would be sustained by
28 the Defendants, if the PUD and Port were to have had the right all along to terminate the
tenancies on the Island despite its alleged promises, are limited to the delay (after June 1,
2012) in returning possession of the Island to the PUD. Any resulting minimal delay
does not present any realistic likelihood of harm to the Port (or the PUD), especially
given that Plaintiffs will continue occupying the real property while making their rent
payments. The fact that the PUD itself does not seek the imposition of any bond suggests
that the PUD does not perceive a risk of any imminent damages from the injunction.

1 Moreover, a party who fails to oppose an injunction is unlikely to be entitled to
2 compensation for damages caused by the provisional relief it consented to. *See e.g., Page*
3 *Communications Engineers, Inc. v. Froehlke*, 475 F.2d 994 (C.A.D.C. 1973 (refusing to
4 impose liability on an injunction bond considering the equities in the case where
5 defendants did not diligently oppose the preliminary injunction).

6 As there is no evidence damages are likely to arise from the injunction, the court
7 will not require that a bond be posted. However, the court will include a condition
8 mandating the continued payment of the current rent pending further order of the court.

9 **E. Duration of the Injunction**

10 Finally, the parties disagree as to whether the Defendants should be enjoined
11 pending the resolution of the case or pending an arbitration decision. In a typical
12 injunction, acts are enjoined pending the resolution of the merits of the case. Sometimes,
13 injunctions are tied to the resolution of related proceedings. In this case, there is no
14 evidence the parties have actually scheduled an arbitration, only that Defendants have
15 apparently invoked an arbitration provision. As arbitration proceedings have not yet
16 commenced, the Preliminary Injunction duration will not be tied those proceedings,
17 although the court encourages the commencement of arbitration or mediation. Should
18 there be a mediation or arbitration decision impacting this case, the parties may ask the
19 court to modify, lift, or reconsider the injunction.

20 **F. Scope of the Injunction**

21 The court notes the Plaintiffs ask that the injunctive relief in this case run to the
22 benefit of non-parties including "other persons or business entities having leases by,
23 through, or under Crescent [Bar, Inc.]" ECF No. 211 at 5. Plaintiffs have submitted
24 declarations of business owners whose businesses (golf course pro shop, a restaurant, a
25 retail shop, vacation rental business) are used by and rely upon the Island residents.
26 Neither the PUD, the Port, or Crescent Bar, Inc have opposed that proposed scope of the
27 injunction.

1 **III. CONCLUSION**

2 The court finds Plaintiffs have demonstrated that a Preliminary Injunction is
3 warranted in this case. For the reasons stated above, the court GRANTS Plaintiff's
4 Motion for a Preliminary Injunction. The court hereby orders as follows:

5 1. The following injunction is entered to preserve the status quo and prevent
6 irreparable harm pending a determination of the action on the merits or further order of
7 the court.

8 2. Pending a determination of the merits of Plaintiffs' claims herein, the PUD,
9 Port, and Crescent Bar, Inc., their agents, servants, employees, representatives, and all
10 persons acting in concert or participating with them are enjoined from terminating the
11 existing leases ; evicting, disturbing the peace and quiet enjoyment of, or engaging in any
12 other conduct that directly or indirectly adversely impacts the quiet enjoyment, use, or
13 possession of the Port, Crescent Bar, Inc., Plaintiffs, or other Crescent Bar, Inc.
14 leaseholders.

15 3. It is unnecessary for Plaintiffs to post a separate bond. The beneficiaries of this
16 injunction Order shall continue paying the current rent throughout the course of this
17 litigation.

18 DATED this 29th day of March, 2012.

19 s/ Justin L. Ouackenbush
20 JUSTIN L. QUACKENBUSH
21 SENIOR UNITED STATES DISTRICT JUDGE
22
23
24
25
26
27
28